Office Supreme Court, U.S.
FILED
JUN 7 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1961

No. 958

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Petitioner*,

v.

WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. O'CONNELL,
Attorney General.

JOHN W. RILEY,
Chief Assistant Attorney General.

TIMOTHY R. MALONE,
Assistant Attorney General,

Attorneys for Respondents.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT OLYMPIA, WASH. 1962

In the Supreme Court of the United States

OCTOBER TERM 1961

No. 958

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Petitioner*,

v.

WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. O'CONNELL,
Attorney General.

JOHN W. RILEY,
Chief Assistant Attorney General.

TIMOTHY R. MALONE,
Assistant Attorney General.

Attorneys for Respondents.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

INDEX

		Page
I	STATUTES INVOLVED	5
II	ARGUMENT	7
	A. No Substantial Question Involving the Commerce Clause of the Federal Constitution is Presented	7
	B. The Decision of the Washington State Supreme Court is Not in Conflict with Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939), and No Possible Risk of Multiple Tax Burdens on Interstate Commerce Exists	11
	C. No Substantial Question Involving the Due Process Clause of the Federal Constitution is Presented	14
	D. No Question Involving the Equal Protection Clause of the Fourteenth Amendment to The Federal Constitution was Raised in Either The State Superior Court or The State Supreme Court; Accordingly, No Such Question Is Reviewable by This Court	14
III	CONCLUSION	15

TABLE OF CASES

Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939) 10, 11, 12, 13

McGoldrick v. Compagnie Gen. Transatlantique, 309 U. S. 430 (1940) 15

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90 (1937) 9

Western Life Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 9

FEDERAL STATUTES

Federal Constitution, Fourteenth Amendment 14, 15

STATUTES

Revised Code of Washington

RCW 82.04.080 6
RCW 82.04.220 5
RCW 82.04.290 5
RCW 82.04.296 5
RCW 82.04.460 ..... 6, 12

Washington Session Laws

§ 4, chapter 225, Laws of 1939 13

OTHERS

Supreme Court Rules (Rule 23, l. (f)) 15

In the Supreme Court of the United States

OCTOBER TERM 1961

No. 958

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Petitioner*,

v.

WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATUTES INVOLVED

In addition to the provisions of the Washington Law relating to the business and occupation tax found in Appendix F of the Petition for Writ of Certiorari, viz., RCW 82.04.220, .290 and .296, cer-

tain other provisions of this same law should be brought to this Court's attention.

Thus, RCW 82.04.080 provides as follows:

"'Gross income of the business' means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses."

And RCW 82.04.460 provides as follows:

"Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this chapter, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state."

II

ARGUMENT

A. No Substantial Question Involving the Commerce Clause of the Federal Constitution Is Presented.

The Articles of Incorporation (Ex. 1) of Washington-Oregon Shippers Cooperative Association, Inc., the Petitioner, state quite succinctly what its purposes and activities are:

> "The purposes for which this corporation is formed are as follows:
>
> "(a) To procure the pooling and consolidating outbound and inbound from and to the Pacific Northwest, transportation and distribution of merchandise for its members on a nonprofit cooperative basis at carload, truckload or other volume rates.
>
> "(b) To procure for its members a more prompt, economical and efficient distribution of their merchandise or products.
>
> "* * *"

As stated by the Washington State Supreme Court in its decision:

> "WOSCA makes no purchases or sales in interstate commerce. The only real activity performed by WOSCA, except for the policy-making function of its Board of Trustees, is that of entering into contractual arrangements with independent contractors. Although some of the contracts entered into by WOSCA concern activities occurring outside of the state, WOSCA is not engaged in these activities; it

merely *procures them as a service for its members.* * * *" (Petition, p. 5A) (Emphasis supplied)

Petitioner's activities are comparable to the activities of a wholesaler. It, in effect, buys the services of independent contractors at the cheapest possible rate, and is thus able to resell, in effect, the services to its members and pass on to them the savings. The tax imposed by the State of Washington on Petitioner's activities is measured by amounts received by Petitioner from its "members" for these "commodities" (insurance, unloading and segregation, delivery, etc.) plus Petitioner's "overhead". (See Ex. 8—Petition 13A)[1]

From this it is readily seen that the gross income used as the measure of the tax in this case is derived from purely local activities or services; for this gross income represents the Petitioner's "overhead" plus charges made by Petitioner to its Washington members for the procurement (and *not the performance*) of certain services by others. This procurement is itself a local, taxable service.

Admittedly, the procurement of these services does involve the formation of contracts with independent contractors, some of whom are located out-

[1]The Court will observe that charges for actual transportation in interstate commerce and railroad "stop off charges" collected by Petitioner are not to be included in the measure of tax, under the decision of the Washington Supreme Court. (See the lower court's discussion of this point: Petition 12A.)

side of the State of Washington. But, as stated by Mr. Justice Stone:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, *unless the performance is within its protection*, is a proposition no longer open to question. * * *" (Emphasis supplied) *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938), at 253.

Now, Petitioner has not shown — because it cannot show — that any of the activities of the independent contractors, the procurement of whose services have been taxed, are "within the protection of the commerce clause."

By procuring the services of the various independent contractors, Petitioner does aid interstate commerce. But *local* activities in aid of interstate commerce are not themselves entitled to the protection of the commerce clause. This is clear from *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937), a case also arising from the State of Washington and also involving the service category of the Washington business and occupation tax. This case decided that, although Puget Sound Stevedoring Co. could not be taxed on its gross receipts derived from actual stevedoring operations, it could be taxed on its gross receipts derived from the procurement of longshoremen for the master of the ship, the master actually directing the

stevedoring. Certainly the taxable activities of the taxpayer in that case were just as much in aid of interstate commerce as are the activities of the Petitioner in this case.

As stated in *Gwin, White & Prince v. Henneford*, 305 U. S. 434 (1939):

> "* * * not every local tax paid upon gross receipts derived from participation in interstate commerce is forbidden. * * *" (at p. 438)

Petitioner argues that the tax in question results in a discriminatory burden on interstate commerce. As Petitioner points out, large shippers do not need to belong to such an organization as WOSCA in order to obtain the cheapest possible handling of their shipments; and small shippers do not need the use of such an organization when they want only intrastate shipments handled. (Petition, pp. 13-17) But these circumstances do not, as Petitioner argues, render the tax on the Petitioner *ipso facto* discriminatory.

Even if there were "discrimination" (*arguendo*), against whom is the tax discriminatory? Against the Petitioner's members? But these members are not engaged in interstate commerce, and they are not the taxpayer in this action. For the same reasons it follows that the Petitioner is not a victim of "discrimination." It is admittedly not engaged in interstate commerce. And the mere fact that the Petitioner's operations are somewhat unique

and relate to interstate shipments does not produce discrimination.

To illustrate the fallacy of the Petitioner's contention, the following example may be helpful. Assume that in State X, all oil comes from out of state. Assume also that small oil companies whose products are brought to market from points outside State find it economically necessary to use the terminaling facilities of an independent terminaling company in State X, whereas larger oil companies can afford to set up their own terminaling facilities. To tax the operations of the independent terminaling company, even though this company facilitates interstate commerce, and handles only shipments received in interstate commerce does not produce a burden upon interstate commerce or discrimination of any kind. Petitioner can cite no authority for such an extreme proposition.

B. THE DECISION OF THE WASHINGTON STATE SUPREME COURT IS NOT IN CONFLICT WITH GWIN, WHITE & PRINCE V. HENNEFORD, 305 U. S. 434 (1939), AND NO POSSIBLE RISK OF MULTIPLE TAX BURDENS ON INTERSTATE COMMERCE EXISTS.

In Gwin, White & Prince v. Henneford, the Washington business and occupation tax was struck down by this Court on the grounds that the tax there undertook

> "* * * to lay a privilege tax measured by gross receipts derived from activities in such [interstate] commerce which extend

> beyond the territorial limits of the taxing state." 305 U. S. 434, at 439.

And the tax in *Gwin* discriminated against interstate commerce.

> "* * * since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. * * *" *Ibid.*

The reason for this extra-territorial effect of the tax, and reason why the risk of multiple taxation was present are found in the fact that the taxpayer in *Gwin* operated outside the State of Washington through its own representatives; that is, through them it negotiated sales, executed contracts of sale, made deliveries, and made collections, all of these activities taking place outside the state. Furthermore the tax in *Gwin* was measured by taxpayer's gross receipts which included proceeds from the sale of property it sold in interstate commerce, which proceeds were remitted to the taxpayer's principals after withholding of the taxpayer's commission for its services.

In contrast, the Petitioner in this case has absolutely no activities outside of the State; another State could not possibly tax its activities, whereas another State could have taxed the activities of the taxpayer in *Gwin*. And thus, in this case, the tax imposed on the Petitioner does not have any extra-territorial effect, in contrast to the tax in *Gwin*.

It should be noted that, under RCW 82.04.460,

persons taxable under the service category of the business and occupation tax may apportion their gross income when they maintain places of business both within and without the state. (This provision was enacted by § 4, chapter 225, Laws of 1939, and thus was enacted too late to have any application in *Gwin*.) Certainly this provision is designed to obviate any commerce clause or due process clause problems in the application of the business and occupation tax. Yet, Petitioner has at no time attempted to take advantage of this provision, and for a very good reason: it does not maintain a place of business outside the state, and transacts no business there. This illustrates strikingly the difference between the instant case and *Gwin*.

Petitioner argues that by imposing the tax in this case, interstate commerce is exposed to multiple tax burdens. (Petition, pp. 17-19) But if these so-called multiple burdens exist at all, they exist only because different activities of different companies are being taxed. The Petitioner is not the same entity as its independent contractors, and the taxable activities of the Petitioner are not the same as the taxable activities of its independent contractors. Therefore, Petitioner's allegations at best do not illustrate "multiple burdens" which are incompatible with the commerce clause.

C. No Substantial Question Involving the Due Process Clause of the Federal Constitution Is Presented.

Certainly a Washington corporation, which has no activities outside of the State of Washington, may be taxed under the due process clause of the Federal Constitution by the State of Washington for services which it renders to its Washington members. Since the State does not here attempt to tax any activities of the taxpayer taking place outside the State, or to measure the tax by any such activities, we fail to see how the State of Washington can lack jurisdiction to tax these activities under the due process clause. Furthermore the taxpayer is admittedly a Washington corporation which is enjoying its corporate franchise by conducting business activities within the State of Washington. Accordingly, Petitioner lacks the slightest vestige of a due process question.

D. No Question Involving the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution Was Raised In Either the State Superior Court or the State Supreme Court; Accordingly, No Such Question Is Reviewable by This Court.

Petitioner argues (Petition, p. 19) that the imposition of the business and occupation tax upon it in this case violates the equal protection clause of the Fourteenth Amendment. While we have pointed out above that there is no factual or legal foundation for arguing that the tax in question is discrimi-

natory, it must be pointed out that neither in the complaint filed in Superior Court (Petition, Appendix D), nor in the Superior Court's opinion (Petition, Appendix I), nor in the opinion of the State Supreme Court (Petition, Appendix A), is there any mention of a question involving the equal protection clause of the Fourteenth Amendment. Accordingly, any such question was not "* * * timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Rule 23, l. (f), Supreme Court Rules. See *McGoldrick v. Compagnie Gén. Transatlantique*, 309 U. S. 430 (1940).

III

CONCLUSION

Petitioner argues, in effect (Petition, pp. 20-21), that if it is subject to taxation, the service which it provides its members will be less attractive to its members than if it were immune from taxation. This may be true, but it is irrelevant. Petitioner's members cannot set up a separate corporation for their own financial advantage, and then be heard to complain that, by taxing the corporation, this financial advantage is somewhat lessened. The tax burdens on this corporation cannot be thrown off simply because these burdens somewhat diminish the financial advantage which it brings its members.

The Petitioner is a Washington corporation engaged in business activities within the State of

Washington. The tax in question is fair and non-discriminatory. It cannot and does not impinge upon interstate commerce.

Accordingly, no substantial Federal question is presented. Therefore, the questions presented by the Petitioner do not merit review by this Court, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General.

JOHN W. RILEY,
Chief Assistant Attorney General.

TIMOTHY R. MALONE,
Assistant Attorney General,
Attorneys for Respondents.